No. 85-1769

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LESLIE WALPOLE PROCTOR, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did this Court intend its discretionary function holding in the *Varig Airlines* case[1] to immunize any and all negligent conduct by every federal regulatory agency employee engaged in carrying out a regulatory function, no matter how operational and violative of the agency's own policies and directives the employee's conduct may be?

[1] *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984).

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LESLIE WALPOLE PROCTOR, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Leslie Walpole Proctor, et al.,[2] pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit. The Court of Appeals upheld the District Court's dismissal of Petitioners' Complaint by interpreting this Court's decision in *Varig v. United States*, 104 S. Ct. 2755 (1984) to immunize the United States against any and all operational misconduct of Federal Aviation Admin-

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[2] The Petitioners are Leslie Walpole Proctor, individually and as representatives of those Underwriters at Lloyd's, London, and those insurance companies, domestic and foreign, subscribing to Policy No. 551/BM1579 which insured a certain Lockheed Tri-Star L-1011 aircraft, Registration HZ-AHK, owned by Saudi Arabian Airlines.

istration employees whose negligent inspection of an aircraft cargo compartment design violated the FAA's own policies and directives and proximately caused Petitioners' loss.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is not yet reported and is printed in the Appendix hereto (App. 1-3). The District Court's unpublished Memorandum Order granting the government's Motion to Dismiss the Complaint, on the ground that no set of facts could ever be proved entitling Petitioners to any relief, is also printed in the Appendix (App. 4-9).

JURISDICTION

The Opinion and judgment of the Ninth Circuit Court of Appeals was entered on January 28, 1986. This Petition is timely filed within 90 days of that date, 28 U.S.C. §2101(c). Federal jurisdiction is claimed under 28 U.S.C. §1346(b) and the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.* The statutory provision granting jurisdiction to this Court is contained in 28 U.S.C. §1254(1) as follows:

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

APPLICABLE STATUTORY PROVISIONS

28 U.S.C. §1346(b)

United States As Defendant

* * *

(b) Subject to the provisions of Chapter 171 of this title, the district courts together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674

Liability Of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compen-

satory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

28 U.S.C. §2860(a)

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

This case arises out of a fatal fire which began in the aftmost cargo compartment of an FAA-certified Lockheed L-1011 Tri-Star aircraft. The relevant facts, which must be viewed in a light most favorable to Petitioners in connection with Respondent's motion to dismiss, are as follows:

Airplane Accident Giving Rise To Petitioners' Claim

On August 19, 1980, exactly one year after its manufacture and delivery as a new aircraft, a Lockheed L-1011 "Tri Star" aircraft, serial no. 1169, operating as Saudi Arabian Airlines Flight 163, departed Karachi, Pakistan for Jeddah, Saudi Arabia, with an interim stop in Riyadh, Saudi Arabia. CR 1 para. 9.

Investigators have concluded that shortly after takeoff from Riyadh for the second leg of its flight, fire broke out in the aircraft's aftmost cargo department. The fire did not remain confined to the cargo department, and smoke, fumes and flames soon entered the aircraft cabin through the floor of the cabin. While the aircraft ultimately managed to make an emergency landing at Riyadh, toxic gases from the fire permeated the passenger cabin, causing the death of all 301 passengers and crew. Fire then destroyed the aircraft. *Id.*

Loss Attributed To The Failure Of Cargo Compartment To Meet FAA Requirements For Fire Containment

Post-accident investigation concluded that the cause of loss was the failure of the aircraft's "Class D" 700 cubic foot

cargo compartment to meet the specific fire containment regulations set forth in the applicable Federal Aviation Regulations, 14 C.F.R. §25.857(d).[3]

FAA Employees Conducted Actual Compliance Inspections Of The L-1011 Cargo Department Design, But Did So Negligently

The Lockheed "Tri Star" L-1011 involved in this case was one of 244 similar "Tri Stars" built by Lockheed Aircraft Corporation in Palmdale, California. Prior to the tragic fire at Riyadh on August 19, 1980, the design bases for cargo compartments on all 244 L-1011 aircraft were inspected, approved, and certified by FAA personnel as meeting each of the requirements set forth in 14 C.F.R. 25.857(d). The FAA did *not* delegate this matter to the aircraft manufacturer, Lockheed. On the contrary, limited document discovery (prior to Magistrate's order cutting off further discovery) has shown that the FAA's policy in this instance was to make a complete and thorough inspection and that FAA inspectors made detailed inspections of all aspects of the cargo compartment's design and actually defended the Lockheed design from criticism lodged by certifying authorities in the United Kingdom while reviewing the design. FAA personnel also performed ground and flight inspections of an actual cargo compartment on a prototype L-1011 aircraft. These various inspection activities are documented on FAA forms signed by the FAA employees and representatives that conducted them.[4]

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[3] Copy of Regulations contained in Appendix hereto (App. 9).

[4] The specific FAA personnel involved in said inspections had been identified and their depositions noticed at the time the District Court Magistrate granted the government's motion to stay all discovery pending disposition of its motion to dismiss.

Petitioners' complaint alleged and Petitioners are prepared to prove that the FAA inspectors performed their inspections in a highly negligent manner and approved the design of the 700 cubic foot cargo compartment on the L-1011 when they knew or should have known that said design did not meet the FAA's Class D requirements.[5] CR 1 para. 9.

The FAA Employees' Negligence Caused Petitioners' Loss

Petitioners' complaint alleged and Petitioners are prepared to prove that Petitioners' subrogor, Saudi Arabian Airlines, relied upon the FAA's inspection of the L-1011 cargo compartment and its certification that said compartment met the fire containment requirements set forth in 14 C.F.R. 25.857(d). CR 1 para. 9. In fact, FAA certification was a condition of sale in Saudi Arabian Airlines' purchase contract with Lockheed, and a certificate of FAA inspection was prominently displayed in each L-1011 aircraft upon delivery to Saudi Arabian Airlines.

If the FAA inspectors had exercised reasonable care in the performance of their inspection, the aircraft would not have been certified and would not have been purchased by Saudi Arabian Airlines, or the cargo compartment would first have been redesigned to meet the Class D

[5] For example, discovery has incredibly revealed that at the time the FAA personnel inspected and approved the L-1011 700 cubic foot cargo compartment as meeting the fire suffocation requirements of 14 C.F.R. 25.857(d), the FAA had already conducted tests which showed that even a 500 cubic foot compartment was too large and contained too much oxygen to suffocate a cargo compartment fire and would not prevent such a fire from reaching the aircraft cabin.

requirements. In either event, the loss would not have occurred and Petitioners would not have been damaged. CR 1 para. 10, 11 and 17.

District Court

The District Court dismissed the action on the pleadings without even allowing discovery to determine the full extent of the FAA employees' negligence and violation of the FAA's own policy directives, citing this Court's decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), et al.*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). In the District Court's view, discovery to determine the actual facts of the FAA's conduct was properly denied since under its interpretation of *Varig*, the discretionary function exception to the Federal Tort Claims Act (FTCA) makes "the entire FAA certification process immune from potential tort liability." (App. 7)

Court Of Appeals

The Court of Appeals for the Ninth Circuit summarily affirmed the District Court, citing *Varig* as controlling (App. 2).

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

THE COURTS OF APPEAL ARE IN PATENT CONFLICT AND DISAGREEMENT AS TO THE INTERPRETATION OF THIS COURT'S HOLDING IN THE *VARIG* AIRLINES CASE.

A. Decision In *Varig*.

On June 19, 1984, this Court rendered its Opinion in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). Citing its prior decisions delineating between discretionary and non-discretionary conduct, *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 2d 1427 (1953) (discretionary function exception protected government's policy and plan for labeling, bagging and storing explosives) and *Indian Towing v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 2d 48 (1955) (discretionary function exception did not protect government from liability for negligence in inspection, maintenance and repair of lighthouse once it exercised its discretion to build it),[6] this Court held that the discretionary function exception to the Federal Tort Claims Act applied to the FAA's discretionary policy decision to conduct a "spot check" of the design of the aircraft (Boeing 707) involved in that case.

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[6] See also *Eastern Airlines Inc. v. Union Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955) (*en banc*), *aff'd sub nom., United States v. Union Trust Co.*, 350 U.S. 907 (1955) (negligence of a FAA control tower operator not within discretionary function exception).

Under this spot check policy, FAA officials, due to manpower and budgetary limitations, had decided to forego inspection of certain elements of the Boeing 707 design and to rely solely on the airplane manufacturer to comply with the applicable regulations in designing those aspects of the aircraft.

The *Varig* Court set forth the following two determinative factors in the discretionary function analysis (104 S. Ct. at 2765):

> "*First*, it is the *nature of the conduct*, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case . . . Thus the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the *nature and quality* that Congress intended to shield from tort liability.
>
> "*Second*, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. . . Congress wished *to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic and political policy* through the medium of an action in tort." (Emphasis added)

Applying these factors to the facts at hand, the *Varig* Court concluded that the discretionary function plainly applied to the FAA's "spot-check" policy, stating (104 S. Ct. at 2768):

> "Here, the *FAA has determined that a program of 'spot-checking' manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety* and the reality of finite

> agency resources. Judicial intervention in such decision making through private tort suits would require the courts to 'second-guess' the political, social, and economic judgments of an agency exercising its regulatory function." (Emphasis added)

B. The Factual Allegations In The Case At Bar Are Totally Different Than The Facts In *Varig*.

The determinative facts of the *Varig* decision concerning the FAA's "spot check" policy for the different aircraft involved in that case and the factual allegations upon which Petitioners' complaint is based in the instant case could not be more contrary.

Petitioners' complaint allegations do not challenge the sufficiency of any policy, discretionary decision or regulatory scheme of the United States or the FAA. Nor do petitioners challenge any FAA determination not to inspect or to spot check or to defer inspection to the manufacturer or to some other entity. On the contrary, the allegations of the instant complaint are: 1) that the FAA's policy decision in this instance was *not* to follow a "spot-check" procedure but to conduct a detailed inspection of the L-1011 cargo department design for compliance with the applicable fire containment regulations in 14 C.F.R. 25.857(d); 2) that the FAA inspectors charged by the FAA with performing such inspections violated FAA policy by conducting their inspections in a negligent and careless manner with the result that they certified the cargo compartment as complying with the said fire containment regulations when such compliance did not exist; 3) that these negligent inspection activities by FAA personnel caused petitioners' subrogor, who relied on that FAA inspection, to suffer the loss for which this action is brought. CR 1 para. 9, 10, 11 and 17.

C. Conflict In Decisions After *Varig*.

In the two years since this Court's decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984), there has literally been a morass of divergent Court of Appeal and District Court decisions as to its meaning.

All Regulatory Activity Protected. Some courts, like the Ninth Circuit in the case at bar, have interpreted *Varig* to confer a blanket of immunity over any and all negligent conduct by every federal regulatory agency employee engaged in carrying out a regulatory function, no matter how nondiscretionary and violative of the agency's own policies and directives the employee's conduct might happen to be. E.g., *Hylin v. United States*, 755 F.2d 551 (7th Cir. 1985) and *Russell v. United States*, 763 F.2d 786 (10th Cir. 1985) (*Varig* discretionary function exception applies to negligent inspection activities by Mine Safety and Health Administration (MSHA) employees); *General Public Utilities Corp. v. United States*, 745 F.2d 239 U.S. *cert. den.* 105 S. Ct. 1227 (3d Cir. 1984) (*Varig* discretionary function exception applies to negligent inspection activities by Nuclear Regulatory Commission employee inspecting nuclear plant); *Waymire v. United States of America*, (D.Ct. Kan. 1/14/86) (Civ. No. 84-2428) (FAA protected by discretionary function exception for negligent inspection activities of its employees, relying on *Proctor*.)

All Regulatory Activity Not Protected. Other courts have interpreted *Varig* in the manner that Petitioners urge here and have held that it is the nature and quality of the regulatory employee's conduct that should be examined, not his status, and therefore acts of negligence that are not discretionary and in fact violate the regulatory agen-

cy's own policies are not protected. *Collins v. United States*, 783 F.2d 1225 (5th Cir. 1986) (*Varig* discretionary function exception did not apply to protect negligent mine inspection by employee of MSHA); *Alabama Elec. Co-op, Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985) (*Varig* discretionary function exception did not apply to protect negligent design decisions on the part of an engineer with Army Corps of Engineers); *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985) (*Varig* discretionary function exception did not apply to negligence of Defense Department inspectors who violated the Department's inspection policies); *Andrulonis v. United States*, 593 F.Supp. 1336 (N.D.N.Y. 1984) (discretionary function exception did not apply to negligence by employee of Federal Center for Defense while carrying out his responsibilities under a federal wildlife immunization program); *Berman v. United States of America*, (N.D. Ga. 1/4/85) (Civ. Act. C80-1479A, C81-301A) (various acts of negligent conduct by FAA employees with respect to the administration of a flight test was not protected by *Varig* discretionary function exception); *Marine Coal Transport Corp. v. United States*, (S.D. N.Y. 5/31/85) (84 Civ. 5265) (*Varig* discretionary function exception did not apply to negligent vessel inspection conducted by Coast Guard employees).

The conflict in decisions was best summed up by the Fifth Circuit in *Collins v. United States, supra*, rejecting the contrary holding of the Seventh Circuit in *Hylin v. United States, supra*, and stating (783 F.2d at 1229 n. 3):

> "To the extent that the holding in *Hylin v. United States*, 755 F.2d 551, 554 (7th Cir. 1985) (per curiam) supports the government's position, *we find it unpersuasive. . . . We disagree with Hylin. . . .* that the presence of discretion in any aspect of the regulatory process means that at any stage of it negligent conduct is within §2680(a)." (Emphasis added)

The issue was also well-framed by the District Court in *Marine Coal Transport Corp. v. United States, supra,* (Slip Opinion, pp. 4-5):

> "Plaintiffs contend that the instant case is distinguishable from *Varig*. Plaintiffs purport not to 'challenge any policy decision or discretionary act of the United States Coast Guard.' Rather, plaintiffs 'allege that the Coast Guard's *duly appointed inspectors negligently failed to act in conformity with delegated authority* and with long established procedures implemented under the Coast Guard statutory mandate to inspect merchant vessels. Plaintiffs thus claim to present the factual scenario which *Varig* itself distinguished: *A government employee's negligent execution of a discretionary safety compliance program.* Such a claim, plaintiffs argue, raises only the issue of individual negligence and does not challenge, as plaintiffs claim in *Varig* necessarily did, the social wisdom, political practicability or economic expediency of an agency's regulatory scheme. *Varig is distinguishable on the ground plaintiffs articulate . . . Whether this distinction will ultimately be sustained will depend on the Supreme Court's evaluation as to the extent to which it undercuts the reasoning in Varig.*" (Emphasis added).

This distinction of *Varig* is exactly the distinction urged by Petitioners and rejected by the Court of Appeals in this case. Petitioners here essentially alleged that duly appointed FAA inspectors negligently failed "to act in conformity with their delegated authority and with established procedures" which in this case dictated a complete and thorough examination of the L-1011 cargo compartment design and thus presented the factual scenario of a government employee's "negligent execution of a discretionary safety compliance program."

In sum, the instant case squarely presents the very issue on which the Circuit Courts of Appeals and the District Courts cannot agree after *Varig*. As the *Marine Coal Transport Corp.* decision correctly notes, such a conflict over the meaning of a decision of this Court can only be resolved by this Court. Thus, to give needed guidance to the federal bench and bar on this recurring issue and to stop the burgeoning growth of conflicting decisions, we urge this Court to act now to resolve the conflict by granting the Writ of Certiorari sought herein.

II.

THE GOVERNMENT'S ATTEMPT TO CONVERT THE DISCRETIONARY FUNCTION EXCEPTION TO A "REGULATORY" FUNCTION EXCEPTION SHOULD NOT BE ALLOWED WITHOUT REVIEW AND APPROVAL BY THIS COURT.

As the *post-Varig* cases makes clear, the government has attempted to use *Varig* to escape Federal Tort Claim Act liability in virtually every case where the negligent government employee (no matter how ministerial, operational and non-discretionary his negligent conduct) was employed by a federal regulatory agency involved in carrying out a regulatory function. Thus, in the case at bar, the government's Court of Appeals' brief was candid to state that its position was not just that all negligence by FAA employees engaged in the aircraft certification process was protected by the discretionary function exception, but rather that the government could not be held liable in tort in any case "for carrying out its regulatory duties" (Appellee Br. 26-27).

Significantly, because of this all encompassing interpretation of *Varig*, the government did not even attempt to rebut Petitioners' contention below that adoption of the

government's view in the instant case would mean that if during the course of an FAA certification test flight an FAA pilot's negligence caused the aircraft to crash killing 100 people, the government would be immune from suit simply because at the time of the accident the FAA was involved in the "certification process." Similarly, the FAA would also be protected where an FAA employee, ordered to perform a specific inspection, instead kept one eye or both on the T.V. or even took the afternoon off and went to the Rams game.[7] The government did not respond to these examples because this is precisely what it wants the law to be after *Varig*.

This Court in *Varig* gave no indication of such an ominous holding. Such a broad proposition and interpretation of *Varig* would overrule literally scores of prior decisions upholding Federal Tort Claim Act liability for negligent, nondiscretionary misconduct by federal regulatory agency employees. E.g., *Lindgren v. United States*, 665 F.2d 978 (9th Cir. 1982) (Bureau of Reclamation); *McGarry v. United States*, 549 F.2d 587 U.S. *cert. den.* 434 U.S. 922 (9th Cir. 1977) (Atomic Energy Commission); *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974) and *Schindler v. United States*, 661 F.2d 552 (6th Cir. 1981) (Department of Health, Education and Welfare); *Gross v. United States*, 676 F.2d 295 (8th Cir. 1982) (Agricultural Stabilization and Conservation Service Committee).

Such an interpretation of *Varig* also overrules the heretofore unanimous decisions (relied upon by Petitioners below) holding that no discretionary function decision should be made without a full hearing to determine the

[7] We believe the evidence will show the negligence of the FAA inspectors in the instant case to be just as irresponsible and as violative of the FAA's own policies as this example.

jurisdictional facts as was done in *Varig*. E.g., *Canadian Transport Co. v. United States*, 663 F.2d 1081, 1093 (D.C. Cir. 1980) (summary judgment reversed and case remanded for further proceedings to establish facts relating to government's claim that Coast Guard was making "policy judgments" protected by 2680(a)); *Schindler v. United States*, 661 F.2d 552, 557 (6th Cir. 1981) (whether or not agency decision complained of protected by §2680(a) requires further factual analysis and perhaps expert testimony); *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359, 363 (5th Cir. 1967) (error for trial court to grant 12(b)(1) motion without opportunity for full proof on merits when question of jurisdiction was so "inextricably connected with the merits of the case itself"); *Ducey v. United States Coast Guard*, 713 F.2d 504, 515 (9th Cir. 1983) (case remanded for examination of whether duty to warn of or guard against hazards on facts of case fell within discretionary function exception).

Before *Varig*, almost all courts rejected the government's claim that the discretionary function exception in 28 U.S.C. §2680(a) acts to "exclude all claims arising from acts of a regulatory nature," *Griffin v. United States*, *supra*, 500 F.2d at 1063. Since *Varig*, many courts have still rejected the government's argument as violative of the very purposes of the Federal Tort Claims Act (See Point I *supra*). Indeed, acceptance of the government's broad brush application of *Varig* to encompass all regulatory function activity would change the discretionary function exception from an exception for policy type decisions to an all encompassing rule whereby the government is insulated from "nearly all tort liability," thereby emasculating the very purposes of the Federal Tort Claims Act. *Collins v. United States*, *supra*, 783 F.2d at 1234 (concurring opinion).

At the very least, this Court, which decided *Varig*, should be the one to decide whether the government's pervasive interpretation of *Varig* is correct. An interpretation of the discretionary function exception that would make it a means by which Federal Tort Claims Act liability is nullified for any and all negligent conduct by government employees of regulatory agencies—even where that conduct contravenes the very regulatory policies, standards and procedures under which the employee is acting—should not become the law of the land without review by this Court.

CONCLUSION

To resolve the patent conflict between the Circuit Courts of Appeal as to the meaning of this Court's holding in the *Varig* case as well as to decide the important issue of whether all federal regulatory agency negligence is protected by the discretionary function exception to the Federal Tort Claims Act, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the Ninth Circuit Court of Appeals herein.

Respectfully submitted,

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APPENDIX

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Opinion Of Court Of Appeals
Rendered January 28, 1986

[Filed January 28, 1986]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-6339
D.C. No. CV 83-3415-AWT

LESLIE WALPOLE PROCTOR, et al.,)
Plaintiffs-Appellants,)
v.) OPINION
UNITED STATES OF AMERICA,)
Defendant-Appellee.)

Appeal from the United States District Court
for the Central District of California
Honorable **A. Wallace Tashima**, *Presiding*

Submitted May 9, 1985,

Before: WRIGHT, ALARCON, and NORRIS, *Circuit Judges*

PER CURIAM:

This is an action brought under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-80 (1982), for damages for loss of an L-1011 aircraft which was destroyed by a fire that originated in the cargo compartment. Plaintiffs base their claim that the government is liable on the allega-

tion that the Federal Aviation Administration (FAA) negligently inspected the cargo compartment for fire safety in the process of certificating the aircraft. The district court dismissed the action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, ruling that the action was barred by sovereign immunity because the FAA's conduct in certificating the aircraft fell within the discretionary function exemption of the FTCA. 28 U.S.C. §2680(a) (1982). We affirm.

In our view this case is controlled by *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 104 S.Ct. 2755 (1984), and *Natural Gas Pipeline Company of America v. United States*, 742 F.2d 502 (9th Cir. 1984). In *Varig* plaintiffs alleged that FAA inspectors negligently failed to inspect the lavatory trash receptacle during an inspection of plaintiffs' aircraft, resulting in the spread of a fire in-flight and the destruction of the aircraft. The Supreme Court ruled that both the FAA decision to apply a "spot-check" system of compliance review, and the application of the "spot-check" system to the particular aircraft were protected by the discretionary function exemption. 104 S.Ct. at 2768. The Court reasoned that since the extent of a given inspection is entirely within the discretion of the FAA employee on-site there could be no governmental liability under section 2680(a). 104 S.Ct. at 2767-68.

In *Natural Gas Pipeline* this court held that *Varig* was controlling precedent in a case involving alleged FAA negligence in failing to discover defects in an aircraft modification process during periodic inspections of a modification plant. Our court, citing *Varig*, held that a "challenge to the FAA's execution of its responsibility by failing to discover the defects sooner and failing to adequately monitor

the [aircraft manufacturing] operation is barred by the discretionary function exemption [to the FTCA.]" 742 F.2d at 504-05.

Plaintiffs attempt to distinguish *Varig* and *Natural Gas Pipeline* on the ground that this case involves alleged FAA negligence in the actual inspection of a discrete part of the aircraft, namely, the cargo compartment. We disagree that this is a legally significant distinction. Although *Varig* involved an alleged negligent failure to inspect, the Supreme Court wrote broadly in concluding that "the discretionary function exemption precludes a tort action based on the conduct of the FAA in certificating . . . aircraft for use in commercial aviation." 104 S.Ct. at 2766. In *Natural Gas Pipeline* our court held that *Varig* controls a case of alleged negligence in conducting actual inspections for certification of a modification plant. We now hold that *Varig* also controls alleged FAA negligence in the actual inspection of discrete parts of an aircraft.

AFFIRMED.

Memorandum Order Of United States District Court For Central District Of California Rendered August 21, 1984

[Filed August 21, 1984]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-3415 AWT

LESLIE WALPOLE PROCTOR, etc., et al., *Plaintiffs,* v. UNITED STATES OF AMERICA, *Defendant.*	MEMORANDUM ORDER OF DISMISSAL

This is an action for property damage and indemnity arising out of a tragic airplane accident. Plaintiffs are insurers who entered into a contract with Saudi Arabian Airlines Corp. ("SAA") to insure a certain Lockheed Tri-Star L-1011 aircraft, registration number HZ-AHK (the "aircraft", or "plane"), for damage to the aircraft and for liability arising out of its ownership and use. Plaintiffs allege that on August 19, 1980, the aircraft was on a regularly scheduled flight between Riyadh and Jeddah, Saudi Arabia, when a fire broke out in the aft part of the plane. The plane returned to Riyadh airport, but was consumed by flames. All 301 persons on board the flight were killed.

Plaintiff insurers allege that they have paid to their insured, SAA, $45 million in full settlement of loss of the aircraft and over $7 million in good faith settlements of wrongful death claims. Plaintiffs bring this action as subrogees of SAA for its claims for property damage and indemnification for payments in settlement of the wrongful death claims. Jurisdiction is invoked under the Federal Torts Claim Act, 28 U.S.C. §§ 2671, *et seq.* ("FTCA").

Plaintiffs claim liability on the part of the United States for the alleged "failure" of employees of the Federal Aviation Administration ("FAA") "to properly inspect" the aircraft for compliance with FAA regulations, resulting in the negligent issuance of a type certification for the aircraft. In its answer, the United States denied plaintiff's allegations of negligence and asserted, *inter alia*, as an affirmative defense, lack of subject matter jurisdiction, pursuant to 28 U.S.C. §2680(a), which bars claims against the United States for discretionary acts of its employees, whether or not the discretion involved is abused.

Recently, in two actions against the FAA "for its alleged negligence in certificating aircraft for use in commercial aviation" the Supreme Court held that the actions were "barred by the discretionary function exception." *United States v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines)*, 104 S. Ct. 2755, 2769 (1984) ("*Varig*"). Before the Court is the government's motion to dismiss; the sole issue raised by the motion is whether *Varig* is controlling.

The Court stated broadly that it granted certiorari in the two cases "to determine whether the United States may be held liable under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, for the negligence of the Federal Aviation Administration in certificating . . . aircraft

for use in commercial aviation." *Id.* at 2758. In one case, a fire in the lavatory of a commercial jet resulted in the death of most of its passengers. Plaintiff alleged that the Civil Aeronautics Agency, the FAA's predecessor, had been negligent when it conducted an inspection and issued a type certificate for an aircraft which did not comply with applicable fire standards. The second case concerned an airplane crash which resulted from an improperly installed heater and the government's alleged negligence in certificating the heater. In holding that both actions were barred by the discretionary function exception, the Court stated that the exception "plainly was intended to encompass discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals." *Id.* at 2765.

The Court then summarized the FAA's regulatory activities:

> In the exercise of this discretion, the FAA, as the Secretary's designee, has devised a system of compliance review that involves certification of aircraft design and manufacture at several stages of production. . . . The FAA certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility of policing compliance. Thus, the manufacturer is required to develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the applicable regulations; the FAA then reviews the data for conformity purposes by conducting a "spot check" of the manufacturer's work.

Id. at 2766-67. The Court concluded that the ultimate responsibility for aircraft safety, and the commensurate

liability for aircraft accidents resulting from a breach of that duty, rested with the aircraft manufacturer rather than with the government: "The FAA has a statutory duty to *promote* safety in air transportation, not to insure it." *Id.* at 2769 (emphasis in original).

Plaintiffs contend that *Varig* is distinguishable because *Varig* addressed only the propriety of the FAA's "spot check" system. Here, plaintiffs do not challenge the propriety of that system, but contend that an inspection, which is alleged actually to have been performed, was performed negligently. Plaintiffs first note that the Court stated:

> From the records in these cases there is no indication that either the Boeing 707 trash receptacle or the DeHavilland Dove cabin heater was actually inspected or reviewed by an FAA inspector or representative. . . . Respondents thus urge in effect that the negligent failure of the FAA to inspect certain aspects of aircraft type design in the process of certification gives rise to a cause of action against the United States under the [FTCA].

Id. at 2766. Plaintiffs then argue that since they do not allege failure to inspect as did respondents in *Varig*, but allege a negligently performed inspection, the holding in *Varig* does not preclude this action. I must disagree.

Although plaintiffs may well accurately characterize the position of respondents in *Varig*, it is clear that the Court adopted the much broader position urged by the government; that is, that the entire FAA certification *process* is immune from potential tort liability. Thus, the Court agreed with the government that "the discretionary function exception precludes a tort action based upon the *conduct of the FAA in certificating these aircraft* for use in commercial aviation." *Id.* (emphasis added).

Plaintiffs contention that *Varig* addressed only the propriety of FAA policy directives, rather than employee conduct in effectuating such directives, is contrary to the opinion.

> It follows that the acts of FAA employees in executing the "spot check" program in accordance with agency directives are protected by the discretionary function exception as well. *See Dalehite v. United States*, 346 U.S. at 36. The FAA employees who conducted compliance reviews of the aircraft involved in this case were specifically empowered to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources.

Id. at 2768.

Plaintiffs' claim of negligent inspection is, in essence, a claim that the FAA should have conducted a more careful or thorough inspection of the aircraft system alleged to have caused the fire. However, *Varig* insulates from liability the discretionary judgment of FAA employees as to the degree of manufacturer oversight deemed necessary in a given certification. This discretionary judgment encompasses decisions to thoroughly check, cursorily check, or not to check at all a particular aircraft or system in order to police compliance with the applicable FAA regulations. Liability simply may not be placed on the FAA in the certification process, as its role merely is to provide incentive, in addition to that provided by prospective tort liability, for manufacturers to manufacture safe airplanes.

A contrary holding would lead to the anomalous situation where the FAA would be immune from liability under *Varig* if it certificated an aircraft without inspection, but

would be subject to liability for any certificated aircraft it did inspect. This would tend to encourage the FAA to inspect as few aircraft as possible, and would run counter to the FAA's statutory responsibility to promote safety in air transportation and to the public interest. It is the kind of judicial second guessing *Varig* counsels courts to avoid:

> Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policy-making that the discretionary function exception was designed to prevent.

Id.

For the foregoing reasons, I conclude that *Varig* is controlling; the discretionary function exception to FTCA jurisdiction precludes this action. Defendant's motion is granted and the action is DISMISSED.

Dated: August 21, 1984

/s/ A. Wallace Tashima
United States District Judge

Relevant Federal Aviation Regulations

§ 25.857 Cargo compartment classification.

* * * *

(d) *Class D.* A Class D cargo or baggage compartment is one in which—

(1) A fire occurring in it will be completely confined without endangering the safety of the airplane or the occupants;

(2) There are means to exclude hazardous quantities of smoke, flames, or other noxious gases, from any compartment occupied by the crew or passengers;

(3) Ventilation and drafts are controlled within each compartment so that any fire likely to occur in the compartment will not progress beyond safe limits; and

(4) [Reserved]

(5) Consideration is given to the effect of heat within the compartment on adjacent critical parts of the airplane. For compartments of 500 cu. ft. or less, an airflow of 1500 cu. ft. per hour is acceptable.